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Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1256 OF 2005
GOPAL SRI RAM, MOHD GHAZALI AND ZULKEFLI JJCA
17 MARCH 2008

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Companies and Corporations — Liquidation — Company wound up — Proceedings against company — Leave to continue proceedings — Whether leave ought to be granted — Principles applicable — Companies Act 1965 s 263(2)

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This was an appeal by the plaintiff/applicant against the decision of the High Court in dismissing the plaintiff's application for an order that the plaintiff be given leave pursuant to s 263(2) of the Companies Act 1965 to proceed with its counterclaim against the defendant/respondent in the Civil Suit No S5–22–77 of 2004 ('the S5 suit'). The defendant had been voluntarily wound

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up by its creditors. The defendant's defence to the counterclaim was, inter alia, that it was baseless frivolous and vexatious as it was made merely to delay and avoid the plaintiff's liability to the defendant under settlement agreements.

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Held, allowing the appeal with costs here and court below:

(1) Leave to proceed would only be granted when the plaintiff's claim could not be adequately dealt with in winding up of the defendant's

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company or when the plaintiff was seeking a remedy which could not be given in the winding up of the defendant's company (see para 11).

(2) The plaintiffs counterclaim in the S5 suit was, inter alia, for a declaratory order that the settlement agreements were null and void as

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against the plaintiff. The settlement agreements did not only involve monetary payment but also payment by way of contra properties to the defendant and its nominees. It was therefore imperative for the plaintiff to obtain such a declaration as it would also determine the rights of contra purchasers whose rights emanated from the settlement

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agreement. The liquidators do not have the power to grant such a declaration (see para 14).

(3) Further, the plaintiff's counterclaim was for rectification costs and general damages to be assessed that would involve some degree of complexity. In the circumstances, it was unlikely that the liquidator

could adequately deal with the plaintiff's counterclaim and quantify the damages suffered by the plaintiff (see para 15).

(4) From the defendant's affidavit in reply, it was clear that the matter had already been pre-judged by the liquidators and the plaintiff's proof of debt would be dismissed and thus it was impractical and inconvenient for the plaintiff to discontinue with its counter claim (see paras 16–17).

(5) The plaintiff's counterclaim against the defendant was far in excess of the defendant's claim and it was unlikely that the amount, even after deducting the whole amount which the defendant claimed in the S5 suit should the defendant succeed in their action, would be realised. Further, since the defendant's claim and the plaintiff's counterclaim in the S5 suit were based on the same facts, the balance of convenience was in favour of leave to proceed being granted to the plaintiff (see paras 18–19).

[Bahasa Malaysia summary

Ini adalah rayuan oleh plaintif/perayu terhadap keputusan Mahkamah Tinggi dalam menolak permohonan plaintif untuk perintah bahawa plaintif diberikan kebenaran menurut s 263(2) Akta Syarikat 1965 untuk meneruskan dengan tuntutan balasnya terhadap defendan/responden di dalam Guaman Sivil No S5–22–77 Tahun 2005 ('guaman S5'). Defendan telah digulung secara sukarela oleh pemiutang-pemiutangnya. Pembelaan defendan terhadap tuntutan balas tersebut adalah, antara lain, bahawa ia adalah tanpa asas, remeh dan menyusahkan kerana ia dibuat semata-mata untuk melambatkan dan mengelakkan liabiliti plaintif terhadap defendan di bawah perjanjian penyelesaian.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

(1) Kebenaran untuk meneruskan hanya akan diberikan apabila tuntutan plaintif tidak boleh diselesaikan secukupnya di dalam penggulungan syarikat defendan atau apabila plaintif memohon remedi yang tidak boleh diberikan di dalam penggulungan syarikat defendan (lihat perenggan 11).

(2) Tuntutan balas plaintif di dalam guaman S5 adalah, antara lain, untuk perintah deklarasi bahawa perjanjian penyelesaian adalah batal dan tidak sah terhadap plaintif. Perjanjian penyelesaian tersebut bukan hanya melibatkan bayaran wang tetapi juga bayaran secara kontra harta defendan dan penama-penamanya. Oleh itu, adalah penting untuk plaintif mendapatkan deklarasi sedemikian kerana ia akan memutuskan

hak-hak pembeli kontra di mana hak mereka timbul daripada perjanjian penyelesaian tersebut. Penyelesai (liquidator) tidak mempunyai kuasa untuk memberikan deklarasi sedemikian (lihat perenggan 14).

(3) Selanjutnya, tuntutan balas plaintif adalah untuk kos pembaikan dan ganti rugi am yang akan ditaksir yang melibatkan sedikit sebanyak kerumitan. Dalam hal tersebut, tidak mungkin penyelesai boleh dengan secukupnya menangani tuntutan balas plaintif dan menyatakan kuantiti kerugian yang dialami oleh plaintif (lihat perenggan 15).

(4) Dari afidavit jawapan defendan, jelas bahawa perkara tersebut telah diputuskan terlebih dahulu oleh penyelesai dan bukti hutang plaintif akan ditolak dan oleh itu ia tidak praktik dan tidak sesuai untuk plaintif menamatkan tuntutan balasnya (lihat perenggan 16–17).

(5) Tuntutan balas plaintif terhadap defendan adalah jauh melebihi tuntutan defendan dan tidak mungkin bahawa jumlah tersebut, walaupun selepas menolak jumlah keseluruhan yang dituntut oleh defendan di dalam guaman S5 jika defendan berjaya dalam tindakannya, akan direalisasikan. Selanjutnya, oleh kerana tuntutan defendan dan tuntutan balas plaintif di dalam guaman S5 adalah berasaskan fakta yang sama, imbangan kesenangan memihak kepada pemberian kebenaran untuk meneruskan kepada plaintif (lihat perenggan 18–19).]

Notes

For a case on company wound up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 417.

Cases referred to

Mosbert Bhd (In Liquidation) v Stella D'Cruz [1985] 2 MLJ 446 (refd)

Legislation referred to

Companies Act 1965 s 263(2)
Rules of the High Court 1980 O 14, O 81

Appeal from: Originating Summons No D5–24–185 of 2005 (High Court, Kuala Lumpur)

Yusuf Khan bin Ghows Khan (Yusuf Khan & Fong) for the appellant.
Olivia CW Ho (Lim Sook Yee with her) (Paul Ong & Associates) for the respondent.

Zulkefli JCA (delivering judgment of the court):

[1] This is an appeal by the plaintiff against the decision of the High Court at Kuala Lumpur in dismissing the plaintiff's application for an order that the plaintiff be given leave pursuant to s 263(2) of the Companies Act 1965 ('the Act') to proceed with its counterclaim against the defendant in Kuala Lumpur High Court Civil Suit No S5–22–77 of 2004 ('the S5 suit').

BACKGROUND FACTS

[2] The relevant background facts of the case are as follows: The plaintiff is a development company engaged in the development project of a complex known as Galaxy Ampang, of which the defendant as the main contractor was responsible for the building construction thereof, having taken over the contract from the previous contractor.

[3] The matters relating to the works in question are contained in those documents known as the letter of intent dated 18 May 1996, the supplementary letter of award dated 29 August 1997, a new letter of award dated 29 August 1997 and another letter of award dated 1 September 1999. The defendant's action in the S5 suit was filed pursuant to the failure of the plaintiff and the defendant to effect the final settlement agreement dated 13 March 2001. Under the said final settlement agreement the plaintiff was to pay the defendant the amount of RM900,000 to be paid in cash and a specific performance of the units of properties in the complex to be transferred to the defendant or his nominees. Alternatively the defendant is seeking from the plaintiff a sum of RM1,585,668 representing the value of the said units and RM156,443.30 representing the short fall of the contra value and rental for a tower crane amounting to RM365,000.

[4] Under a settlement agreement dated 22 December 1999, the parties resolved to settle the payment of the works completed up till 22 December 1999 which was to be effected by monetary as well as contra payment in the form of sale and purchase agreements in respect of contra units in the complex. Subsequently a second settlement agreement was entered into on 13 March 2001 (the final settlement agreement) which, inter alia, supersedes the aforesaid settlement agreement dated 22 December 1999 particularly in the mode of payment.

[5] Consequent to the cessation of works by the defendant, as envisaged by the said final settlement agreement, the plaintiff appointed another new contractor to complete the remaining works left. Upon examining the works to be continued and completed the new contractor discovered serious latent

defects which were so fundamental as to render it impossible to continue the works from where the defendant left them for the new contractor to take over. The latent defects had to be rectified first and in certain instances to be redone, as they were wrongly carried out and completed contrary to specifications and basic requirements. The estimated costs of rectifying these latent defects is about RM17,898,000 and is now made the subject of the plaintiffs counterclaim against the defendant's claims under the final settlement agreement.

[6] After the defence and counterclaim was filed by the plaintiff, the defendant was voluntarily wound up by their creditors on 28 April 2004. The defendant's defence to the plaintiff's counterclaim is, inter alia, that the plaintiff's counterclaim is baseless, frivolous and vexatious as it was made merely to delay and avoid the plaintiff's liability to the defendant.

[7] Parties have filed their respective pleadings in the court and the plaintiff's appeal against the summary judgment obtained by the defendant in the said S5 suit pursuant to O 14 of the Rules of the High Court 1980 ('RHC 1980') was allowed by the court, whilst the defendant's application for specific performance pursuant to O 81 of the RHC 1980 was withdrawn by the defendant with no order as to costs. The matter is now fixed for case management.

DECISION OF THE COURT ON APPEAL

[8] We heard this appeal on 17 May 2006 and we were unanimous in our decision allowing the appeal. We now give the reasons for our decision as follows.

[9] The plaintiffs application for leave to proceed with its counterclaim against the defendant in the S5 suit is made pursuant to s 263(2) of the Act which reads:

> After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[10] On the guiding principle for the court to grant leave with a view to commencing action against a company that has been wound up we would like to refer to the case of *Mosbert Bhd (In Liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 wherein Sean SCJ, in delivering the judgment of the Supreme Court at p 447 had this to say:

In *re Cuthbert Lead Smelting Co Ltd* [1886] WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the court will always give an application for leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.

[11] It is clear based on the above cited case authority leave to proceed would only be granted when the plaintiff's claim cannot be adequately dealt with in winding up of the defendant's company or when the plaintiff is seeking a remedy which cannot be given in the winding up of the defendant's company.

[12] In dismissing the plaintiff's application, the learned judge in his judgment held, inter alia, as follows:

(a) Lodging a proof of debt constitutes a mandatory statutory process for a creditor of a wound up company like the plaintiff in this case;

(b) The institution and continuance of the plaintiffs counterclaim or even the recovery of any judgment by the plaintiff will operate to confer a 'sort of an unfair priority or advantage and undue preference' over the other creditors of the defendant's company including secured creditors;

(c) The plaintiff is not restrained or impeded in any way from lodging a proof of debt with the liquidators of the defendant's company;

(d) The allegation of bias or incompetency by the plaintiff against the liquidators of the defendant is baseless and unjustified;

(e) The plaintiff is not deprived of any legal right nor prejudiced in any way;

(f) The counterclaim of the plaintiff is only at the stage of case management;

(g) To allow the plaintiff to proceed with their counterclaim would be time consuming and involves substantial costs being expended by the defendant;

(h) In the long run the trial of the plaintiff's counterclaim and the hearing of various other interlocutory applications filed or may be filed by the plaintiff against the defendant would render an unnecessary heavy financial strain on the defendant;

(i) The proof of debt process in the winding up of the defendant serves the very same purpose and is much cheaper and expeditious;

(j) The plaintiff's counterclaim is drummed up to thwart and delay the defendant's original claim as well as to disrupt and delay the winding up process the defendant which would only result in the perpetration of injustice;

(k) The plaintiff's application for leave is evidently a fruitless proceeding and a waste of time and costs;

(l) In accordance with the terms of the settlement agreement it is prima facie evidence that the plaintiff is not entitled to make any further claim including the counterclaim which is purportedly based on latent defects in relation to the works which have been completed by the defendant and agreed to be fully settled by the plaintiff under the settlement agreement;

(m) The sole question to be determined is only a question of liability, ie whether the defendant is liable for the latent defects alleged by the plaintiff. Such question of liability hinges on the construction of the effect and intention of the settlement agreement;

(n) This question of defendant's liability has clearly been raised by the plaintiff via its defence filed against the defendant's original claim;

(o) The plaintiff's allegation that their counterclaim cannot proceed because the winding up court could not grant any relief in the form of a declaratory order cannot stand at all when the plaintiffs prayer for declaration can be adequately dealt within the original claim;

(p) The plaintiff's counterclaim is based on estimated costs. It is purely a speculative claim which most probably would not succeed.

[13] We are of the view it is apparent from the learned judge's findings that he misdirected himself on the facts and/or the law in dismissing the plaintiff's application for leave to proceed with their counterclaim in the action. It is our judgment that the plaintiff's counterclaim cannot be dealt with adequately in the winding up by the defendant's liquidators for the following reasons.

[14] Firstly, we noted that the plaintiff's counterclaim in the said S5 suit, is, inter alia, for a declaratory order that the settlement agreements are null and void as against the plaintiff. The settlement agreements do not only involve monetary payment but also payment by way of contra properties to the defendant and their nominees. It is therefore imperative for the plaintiff to obtain such a declaration as it will also determine the rights of contra purchasers whose rights emanate from the said settlement agreement. The liquidators, however, do not have the power to grant such a declaration.

[15] Secondly, the plaintiff's counterclaim is for rectification costs of RM17,898,000 and general damages to be assessed. In view of the extent and seriousness of the defects wherein there would be some degree of complexity of issues involved, it is unlikely that the defendant's liquidators can adequately deal with the plaintiff's counterclaim and quantify the damages suffered by the plaintiff in the winding up of the defendant.

[16] Thirdly, it is evident from para 6.10 of the defendant's affidavit in reply to the plaintiff's present application that the liquidators have already pre-judged the matter and would definitely dismiss the plaintiff's proof of debt. This is what the liquidators have averred at para 6.10 of their affidavit:

> The plaintiff's counterclaim is an afterthought, a baseless claim and has been filed with a view to delaying the implementation of the said settlement agreements. In addition the plaintiff has never objected as to the validity of the settlement agreements until the filing of the defendant's claim in the said S5 civil suit. (Translated).

[17] If the liquidators had already pre-judged the matter or the issues to be decided by them, it would be impractical and inconvenient for the plaintiff to discontinue with their counterclaim under the said S5 suit and to file its proof of debt, only to file an appeal against the decision of the liquidators soon thereafter.

[18] Fourthly, the plaintiff's defence and counterclaim also includes set off in the event that the defendant succeeds in their claim. As the plaintiff's counterclaim for latent defects against the defendant is far in excess of the defendant's claim and the defendant is now under creditor's voluntary liquidation, it is unlikely that the amount counterclaimed against the defendant even after deducting the whole amount which the defendant claims in the said S5 suit should the defendant succeed in their action, would be realised. It is to be noted also that if the plaintiff is to discontinue their counterclaim in the said S5 suit and proceed to lodging a proof of debt with the liquidators, there would be no avenue for the plaintiff to set off the defendant's claims against the plaintiff.

[19] Finally, we are of the considered view as the defendant's claim and the plaintiff's counterclaim in the said S5 suit are based on the same facts, the balance of convenience is in favour of leave to proceed being granted to the plaintiff.

CONCLUSION

[20] For the reasons above stated we would allow this appeal with costs here

A and in the court below and made an order in terms of the plaintiff's application dated 3 June 2005. All orders made by the High Court are set aside. The deposit paid is to be refunded to the plaintiff.

Appeal allowed with costs here and court below.

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Reported by Brendan Navin Siva

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